

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF APPLICATIONS)
BY JOHN E. AND PATRICIA J.)
SCHROM AND J.M. HANSON TO)
APPROPRIATE PUBLIC SURFACE)
WATERS GRANTED BY THE STATE OF)
WASHINGTON, DEPARTMENT OF)
ECOLOGY,)

U. S. BUREAU OF RECLAMATION,)
EAST COLUMBIA BASIN IRRIGATION)
DISTRICT, QUINCY-COLUMBIA BASIN)
IRRIGATION DISTRICT, and SOUTH)
COLUMBIA BASIN IRRIGATION)
DISTRICT,)

Appellants,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY, and)
JOHN E. and PATRICIA J. SCHROM,)
and J.M. HANSON,)

Respondents.)

PCHB Nos. 84-64, 84-67,
84-68, 84-98, 84-102,
84-103, and 84-104

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

On September 6, 1984, respondent State of Washington, Department
of Ecology (DOE) filed its Motion for Summary Judgment in the above

1 matters.

2 On October 15, 1984, appellants filed their joint Motion for
3 Summary Judgment in the above matters.

4 Having considered these together with the following:

- 5 1. DOE's Memorandum filed September 6, 1984;
- 6 2. Affidavit of Eugene F. Wallace dated September 6, 1984;
- 7 3. Appellants' memoranda filed October 15, 1984 (two documents
8 with attachments);
- 9 4. Affidavit of Russel D. Smith dated October 10, 1984;
- 10 5. Affidavit of Tom Cotton dated October 11, 1984;
- 11 6. Affidavit of James V. Cole dated October 11, 1984;
- 12 7. Affidavit of George E. Maddox dated October 15, 1984;
- 13 8. Affidavit of Jerome M. Hanson dated November 29, 1984;
- 14 9. Two responsive Affidavits of Theodore M. Olson, each dated
15 December 14, 1984;
- 16 10. Responsive Affidavit of James V. Cole dated December 28, 1984;
- 17 11. Responsive Affidavit of Edmund Kemp dated December 26, 1984.

18 And being fully advised, and there being no genuine issue of material
19 fact, NOW THEREFORE, the following are preserved as undisputed fact:

20 1. Respondents, John E. and Patricia J. Schrom, applied to the
21 State of Washington, on October 2, 1964, to appropriate public surface
22 waters. (Application No. 18735.)

23 2. Respondent, J.M. Hanson, applied to the State of Washington to
24 appropriate public surface waters on May 3, 1983. (Application No.
25 S3-27552.)

26
27 ORDER ON MOTIONS
FOR SUMMARY JUDGMENT
PCHB Nos. 84-64, 84-67/68,
84-98, 84-102-84-104

1 3. The proposed appropriations would divert, at least in part,
2 waters originating with the Columbia Basin Project. Such waters are
3 imported to the area through the operation of the project, and would
4 not be in the area of the proposed diversions, but for the Project.

5 4. The Bureau of Reclamation does not have present plans to
6 construct recapture facilities below Schroms' proposed diversion on
7 Lower Crab Creek, nor below Hanson's proposed diversion on the unnamed
8 channel running through his property.

9 5. The proposed points of diversion for Schrom and Hanson are
10 within the exterior boundaries of the Columbia Basin Project.

11 6. The proposed Hanson diversion would be from a flow of water
12 which appears to originate on Hanson land now being served as a Farm
13 Unit (FU19) by the Columbia Basin Project.

14 7. The contract between the U. S. Bureau of Reclamation and the
15 affected Irrigation Districts, dated December 18, 1968, and now in
16 effect provides:

17 WASTE, SEEPAGE, AND RETURN FLOW WATERS

18 24(a). The United States does not abandon or
19 relinquish any of the waste, seepage, or return flow
20 waters attributable to the irrigation of the lands to
21 which water is supplied under this contract. All
22 such waters are reserved and intended to be retained
23 for the use and benefit of the United States as a
24 source of supply for the project. The recapture
25 and/or reuse of waste, seepage, or return flow waters
26 for further utilization by the Districts through the
27 irrigation system shall not be considered as
inconsistent with the intent of Article 32.

24 24(b). If waste, seepage, and return flow
25 waters from any part of the project not needed for
26 use by the United States for project irrigation water
27 supply can be used on lands within the District, the

1 District may supply such water as a part of the
2 supply of the District. Such water supplied by the
3 District at its cost and expense shall be a
4 supplement to its share of the irrigation water
5 supply and shall not affect its prorated diversion
6 right as set forth in subarticle 13(b). (Emphasis
7 added.) (P. 47)

8 8. If the subject waters originating with the Columbia Basin
9 Project are proprietary waters of the United States, a charge will be
10 made for use of the waters. This charge is intended to offset Project
11 costs. If the subject waters originating with the Columbia Basin
12 Project are public waters, no charge will be made for use of the
13 waters.

14 9. The Schrom application was granted by temporary permit issued
15 by the State of Washington, Department of Conservation on January 19,
16 1965. That permit provided:

17 Furthermore, an authorization under this
18 temporary permit applies only to the diversion of the
19 naturally occurring waters of Lower Crab Creek.
20 (Emphasis added.)

21 The respondent, State Department of Ecology, is successor to the State
22 Department of Conservation.

23 10. The State Department of Ecology issued Orders granting
24 permits under the Schrom application on January 31, 1984, and the
25 Hanson application on April 12, 1984. These Orders do not restrict
26 appropriation to naturally occurring waters.

27 From these undisputed facts, the Board comes to the following
28 Conclusions of Law:

I

The United States Bureau of Reclamation through its right of appropriation from the Columbia River, has probably applied the waters in question to a beneficial use, namely irrigation. Such use would not, however, terminate the water right. The water right, which encompasses a right to recapture once-used waters for use a second time, may be lost by abandonment. Miller v. Wheeler, 54 Wash. 429, 103 P.2d, 641 (1909); United States v. Haga, 276 Fed. 41 (D. Idaho 1921); Ide v. United States, 263 U.S. 497 (1924). However, abandonment is a question of intent. The intent to abandon and an actual relinquishment must concur, for courts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region. Miller, supra, at p. 435. We conclude that appellants have shown no intent to abandon the water right under which once-used water might be recaptured for use a second time. The water right of the United States has not been abandoned.

II

1. The Department of Ecology next urges that if there has been no abandonment of the water right, yet the United States has lost possession of the corpus of the water. Such a loss has been characterized as "relinquishment of the very particles of the water" which are discharged without intent to recapture. As a consequence, DOE urges that such particles of water are available, temporarily, to public appropriation until recaptured by the United States or, at least, until the United States manifests an intent to recapture. No

1 statute or case from Washington State has been cited for this
2 proposition.

3 2. The proposition that water particles may be relinquished has
4 been cited, in dicta, in a California case, Stevens v. Oakdale
5 Irrigation District, 13 Cal. 2d 343, 90 P.2d 58 (1939). However, the
6 facts in Stevens involved a recapture of once-used irrigation water by
7 the District upon its own land, which was upheld in consonance with
8 U.S. v. Haga, supra. The holding of the case was that Stevens, who
9 had been appropriating the waste water after it left District land,
10 could not compel the District to continue discharging the once-used
11 water.

12 3. A Montana case, Rock Creek Ditch and Flume Co. v. Miller, 93
13 Mont 248, 17 P.2d 1074 (1933), cited by DOE, states:

14 The corpus of running water in a natural stream
15 is not the subject of private ownership. Such water
16 is classed with light and the air in the atmosphere.
17 It is public juris or belongs to the public. A
18 usufructory right or right to use it exists, and the
19 corpus of any portion taken from the stream and
20 reduced to possession is private property so long
21 only as the possession continues. (Emphasis added.)

22 This reasoning was used in support of the decision that the imported
23 water once used by the Ditch Co. and allowed to flow from its lands in
24 a natural stream could not be recaptured downstream by a stockholder
25 of the Ditch Co., as against Miller who had begun appropriating it.
26 This constitutes a result arguably at odds with that of Ide v. U.S.,
27 supra. The Supreme Court of Montana, recognizing this, distinguished
Ide by noting that the waste in Ide was allowed to flow into an
otherwise dry ravine, not a natural stream course. This distinction

1 was unrecognized in Miller v. Wheeler, supra, in Washington State
2 which reached the Id result of allowing recapture despite the flow of
3 waste into a natural stream. The rule in Montana therefore appears to
4 be one peculiar to that state [and possibly Colorado, see De Haas v.
5 Benesch, 116 Colo. 344, 181 Pac. 2d 453 (1947)].

6 4. Both the California case of Stevens, supra, and the Montana
7 case of Rock Creek, supra, involved review of attempts to recapture
8 once-used water by the original appropriator. To the extent that
9 appropriation by another had been occurring beforehand, it had left
10 the lands of the original appropriator. Other cases from Utah¹ and
11 Oregon² cited by DOE appear to follow this pattern.

12 5. We are aware of no case in which the original appropriator has
13 been held to relinquish the particles of once-used water until that
14 water has passed from the first appropriator's lands. Moreover, the
15 following is set forth by the Supreme Court of Nevada:

16 So long as waste water exists upon the lands of those
17 who have been using the original flow, it is the
18 property of such persons. They may consent to the
19 acquisition of rights therein by other persons upon
20 their own property and in ditches constructed on
21 their own property for the purpose of conveying such
22 rights to the lands of such other parties. But
23 without the original landowner's consent, such water
24 is not subject to appropriation by anyone else.
25 (Emphasis added.) Bidleman v. Short, 38 Nev. 467,
26 150 Pac. 834 (1915)

27 1. Lasson v. Seely, 120 Utah 679, 238 P.2d 418, (1951).

28 2. Cleaver v. Judd, 238 Or. 266, 393 P.2d 193 (1964).

1 The following is set forth by the Supreme Court of Oregon:

2 ...water is not waste water so long as it remains
3 upon the land of the original appropriator. Barker
4 v. Sonner, 135 Or. 75, 79, 294 Pac. 1053 (1931).

5 The following is set forth by the Supreme Court of Utah:

6 But once the water has passed onto the land of
7 another and out of control of the user, the right to
8 use such water passes to the occupant of the land
9 upon which it is then found, or may become water
10 unused by any one and subject to capture and use by
11 the first person to capture and use it. (Emphasis
12 added.) Smithfield West Bench Irr. Co. v. Union
13 Central Life Ins. Co., 105 Utah 468, 472-473, 142
14 Pac. 2d 866 (1943).

15 The following is a statute enacted by the Legislature of New Mexico:

16 Artificial surface waters, as distinguished from
17 natural surface waters, are hereby defined for the
18 purpose of this act as waters whose appearance or
19 accumulation is due to escape, seepage, loss, waste,
20 drainage or percolation from constructed works,
21 either directly or indirectly, and which depend for
22 their continuance upon the acts of man. Such
23 artificial waters are primarily private and subject
24 to beneficial use by the owner or developer thereof;
25 Provided, that when such waters pass unused beyond
26 the domain of the owner or developer and are
27 deposited in a natural stream or watercourse and have
28 not been applied to beneficial use by such owner or
29 developer for a period of four (4) years from the
30 first appearance thereof, they shall be subject to
31 appropriation and use; Provided, that no appropriator
32 can acquire a right, excepting by contract, grant,
33 dedication or condemnation, as against the owner or
34 developer compelling him to continue such water
35 supply. (Emphasis added.) NMSA Section 72-5-27
36 (1978).

37 6. The original appropriator of the water in question, the United
38 States Bureau of Reclamation, does not hold title to land within

1 Project boundaries.³ However, for the purpose of "relinquishment of
2 water particles," the area within Project boundaries should be
3 regarded as the lands, or domain, of the original appropriator.⁴
4 This conclusion is supported not only by important considerations of
5 jurisdictional clarity but rests upon the orderly application of
6 established principles. It assures that where the original
7 appropriator is a federal reclamation project, its status is not less
8

9 3. Respondent, Hanson, holds title to land within Project
10 boundaries. In his circumstances, the water at issue appears to
11 be appropriated by the Project, purchased by Mr. Hanson from the
12 Project, delivered by Project works, applied to a Farm Unit (FU19)
13 on the upper portion of his land, and appears to then seep back to
14 the surface and flow to a lower portion of his land where he
15 proposes to divert it. If this is so, he urges that he, as
16 landowner, not the United States as original appropriator, may
17 recapture this water on the basis that it would be water that he
18 purchased and which has not left his land. We express no opinion
19 upon this claim since it raises a proprietary dispute between the
20 United States as vendor and Mr. Hanson as purchaser of Project
21 water. The claim does not provide support for a finding that the
22 subject water is public and thus subject to appropriation under
23 the permits at issue.

24 4. See Cleaver v. Judd, *supra*, at p. 271 wherein a similar rule is
25 announced on the issue of recapture:

26 The only question remaining is whether the facts bring the
27 instant case within the principle that an owner may recapture
waste and seepage water before it leaves his land. An
irrigation district, being a municipal corporate entity, is
regarded as an owner for the purpose of applying this
principle.

Then, at pp. 272-273:

In the case at the bar the waste and seepage water was
recaptured within the defendant irrigation district. We
regard it as immaterial that a part of the waste and seepage
may have had its source in one of the other irrigation
districts in the Owyhee Federal Reclamation Project. For the
purposes of applying the principle that an owner may
recapture waste and seepage water, the project may be treated
as an entity.

1 than that of original appropriators who are private parties.

2 7. We hold that the subject waters originating with the Columbia
3 Basin Project have not left the lands of the original appropriator.
4 This being the case, we hold consistent with the weight of authority,
5 that these waters have not become public waters through the common law
6 doctrine of relinquishment of water particles.

7 III

8 The subject permits, purporting to authorize appropriation of
9 these waters as public waters, should be reversed.

ORDER

The appellants' Motion for Summary Judgment is granted. The respondent's Motion for Summary Judgment is denied.

The Department of Ecology Orders dated January 31, 1984, and April 12, 1984, granting public surface water permits to respondents Schrom and Hanson under Applications Numbers 18735 and S3-27552 are each, hereby, reversed.

This Order is without prejudice to the subsequent granting of these Applications in a manner consistent with this Order and other legal requirements.

DONE at Lacey, Washington, this 7th day of February, 1985.

POLLUTION CONTROL HEARINGS BOARD

 2/7/85
LAWRENCE J. FAULK, Chairman


GAYLE ROTHROCK, Vice Chairman


WILLIAM A. HARRISON
Administrative Appeals Judge